IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 352 - 353

UNIVERSAL OIL PRODUCTS COMPANY,
Petitioner,

v.

ROOT REFINING COMPANY and
SKELLY OIL COMPANY,
Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

RALPH S. HARRIS,
Attorney for Petitioner.

JOHN R. MCCULLOUGH,
FREDERICK W. P. LORENZEN,
A. M. BYRD,
Of Counsel.

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PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Universal Oil Products Company, prays that writs of *certiorari* issue to the United States Circuit Court of Appeals for the Third Circuit to review those portions of two orders of said Circuit Court of Appeals, entered on June 20, 1947, in an investigation (conducted by it and under its auspices, at the behest of certain attorneys termed *"amici curiae"*), captioned in causes in said court entitled "Root Refining Company, Defendant-Appellant, v. Universal Oil Products Company, Plaintiff-Appellee", Nos. 5648 and 5546, which (a) directed your

petitioner to show cause before said Circuit Court of Appeals on October 13, 1947, why the judgments of that court entered in the said cause entitled "Root Refining Company, Defendant-Appellant, v. Universal Oil Products Company, Plaintiff-Appellee" on June 26, 1935, should not be set aside and vacated by reason of alleged fraud and corruption practiced upon the said Circuit Court of Appeals by your petitioner or those acting upon its behalf, and (b) granted the petition of Skelly Oil Company to intervene "to participate in any further proceedings in this Court or in the district court on the question whether there should be a dismissal for fraud".

A certified transcript of the record is furnished herewith in compliance with Rule 38 of this Court.*

Jurisdictional Statement

Jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by Act of February 13, 1925 (28 U. S. C. § 347).** The orders, portions of which are sought to be reviewed, were entered on June 20, 1947 (R. 174-7).***

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*Petitioner is filing with this petition a certified transcript of the record in these proceedings since December 29, 1944 (the last date reviewed by this Court in *Universal Oil Co.* v. *Root Rfg. Co.*, 328 U. S. 575) and is simultaneously seeking leave of this Court to incorporate by reference the certified record in *Universal Oil Co.* v. *Root Rfg. Co., supra.*

**Petitioner has filed simultaneously herewith motions for leave to file petitions for writs of *certiorari,* and for writs of prohibition and mandamus in each of which it invokes jurisdiction of this Court under Section 262 of the Judicial Code (28 U. S. C. § 377).

***References styled "R. " are to pages in the certified record accompanying this petition; references styled "v. , p. " are to pages of the certified record in cause numbered 48, October Term, 1945, incorporated by reference.

Summary and Short Statement of Matter Involved

The portions of the two orders now sought to be reviewed represent the latest steps taken by the court below to place the stigma of fraud upon your petitioner without a trial in a justiciable case or controversy under the Constitution conducted according to the requirements of due process of law. The earlier steps taken by the Court of Appeals resulted in a reversal by this Court in *Universal Oil Co.* v. *Root Rfg. Co.*, 328 U. S. 575. This Court's criticism of the earlier proceedings below applies with equal force to the portions of the orders now sought to be reviewed. Indeed, your petitioner is informed and believes that the further steps embodied in the orders of the Court of Appeals deviate from this Court's mandate following the determination of the previous review.

Your petitioner is a corporation duly organized and existing under the laws of the State of Delaware, having its principal place of business at 310 South Michigan Avenue, Chicago 4, Illinois.

The Circuit Court of Appeals for the Third Circuit, as will hereinafter more fully appear, has purported to assume jurisdiction and to take certain action and has entered certain orders, portions of which were wholly beyond the powers and authority of said court.

The action taken, jurisdiction assumed and the orders entered purport to be in causes heard and determined on appeal by the Court of Appeals in 1935 and entitled in that court "Root Refining Company, Defendant-Appellant, v. Universal Oil Products Company, Plaintiff-Appellee", Nos. 5648 and 5546 (said causes being hereinafter some-

times referred to as the "*Root* case"). Actually the Court of Appeals has assumed jurisdiction and taken action in an investigation in which, petitioner is advised, the Court of Appeals is without jurisdiction to deprive petitioner of its property.

In 1939, after the determination of the appeal in the *Root* case, petitioner and Root Refining Company (the only parties to the *Root* case) fully settled their controversy and the case became wholly moot (R. 161).

Thereafter, in 1941, certain attorneys, namely, Arthur C. Denison, J. Bernhard Thiess, Thorley von Holst and Arthur G. Logan, Esqs., appeared before the Court of Appeals for the Third Circuit and suggested an investigation by the court of the relationship, if any, between petitioner, Circuit Judge J. Warren Davis and an attorney by the name of Morgan S. Kaufman.

None of these attorneys was a party to or appeared as attorney for or representative of any party to the *Root* case. The defendant Root Refining Company signified its unwillingness to appear or to be made in any wise a party to the investigation suggested by the aforesaid attorneys.

The Court of Appeals suggested that, in the absence of parties, said attorneys appear as *amici curiae,* which was done. Subsequently, the Court of Appeals ordered that an investigation, as suggested by these attorneys, be conducted by a master appointed by it; the investigation was held; a report and findings of fraud were submitted by the master to the Court of Appeals; said findings were approved and adopted by the Court of Appeals which, on June 15, 1944, entered an order setting aside the judgments of affirmance in the *Root* case. All this action was taken despite the fact that there were no formal pleadings,* no issues and

*Other than a petition by *amici curiae* and various other documents which, we submit, did not serve the purpose of formal pleadings (v. I, p. 29-54, 55-60, 61-76, 77-89, 90-3).

no adversary parties before the court and despite the protest of your petitioner that no case or controversy under the Constitution existed and that no juridical action affecting its property could be taken in the premises (v. I, p. 121-4). Indeed, the master, before whom the hearings were held, construed the entire matter as a mere investigation, privately informed himself of certain facts, only some of which were made available to your petitioner, conducted the investigation informally and without strict regard to the rules of evidence and without affording your petitioner "the usual safeguards of adversary proceedings."

On July 28, 1944, your petitioner and Root Refining Company entered into a further settlement agreement which provided, *inter alia*, that the decree of the district court in the *Root* case be vacated, that the bills of complaint filed therein be dismissed and that either party might cause an order to be entered or do any other necessary or advisable thing to effectuate the foregoing without further notice to the other (R. 170).

Subsequent to the entry of its order of June 15, 1944, setting aside the judgments of affirmance in the *Root* case for fraud, the Court of Appeals entertained an application on behalf of the two remaining *amici curiae* (one of the others having died in 1942 and the other having ceased to participate in the same year) and, under date of December 29, 1944, entered an order granting them compensation and reimbursement for their expenses as well as for the fees and expenses of the master. The Court of Appeals directed that all of these amounts be taxed against your petitioner (v. IX, p. 3692-3).

Said order of December 29, 1944, was brought to this Court by writ of *certiorari* and, after a review of the

action taken by the Court of Appeals up to that date, was reversed (328 U. S. 575).*

In furtherance of said investigation undertaken by the Court of Appeals in 1941 and, petitioner is advised, in part in conflict with the aforesaid decision of this Court, *supra*, two identical orders were entered by the Court of Appeals under date of June 20, 1947 in the *Root* case, portions of which orders are now sought to be reviewed by this Court.

By said orders, the Court of Appeals has directed as follows (though not in the following sequence [R. 174-7]):

(a) that its order of June 15, 1944 (which, following the investigation, set aside the judgments of affirmance in the *Root* case) be vacated;

(b) that your petitioner show cause, if any there be, before the Court of Appeals on October 13, 1947, why the judgments of affirmance in the *Root* case should not be set aside and vacated "by reason of alleged fraud and corruption practiced upon this court by Universal Oil Products Company or those acting on its behalf";

(c) that Skelly Oil Company (which had never been a party to the *Root* case or interested in any of the original issues thereof) be permitted to intervene as prayed, *i.e.*, "to participate in any further proceedings in this Court [Court of Appeals] or in the district court on the question whether there should be a dismissal for fraud"; and

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*Except that this Court did not disturb the direction that petitioner pay the master's fees and expenses on account of petitioner's "acquiescing knowledge" that these would be assessed by the court. This sum petitioner has cheerfully paid.

(d) that the Attorney General be permitted to appear as *amicus curiae*.

It is with respect to subdivisions (b) and (c) above that petitioner now seeks a review by this Court.

The following is a brief chronology of events occurring in the investigation from the date of the previous review thereof by this Court (328 U. S. 575):

The opinion of this Court, *supra*, dealt with steps taken in the investigation up to December 29, 1944. Under date of June 20, 1946, the Court of Appeals, through its clerk, invited the suggestions of your petitioner and of *amici curiae* as to "the present status of the appeals" in the *Root* case "now that the petitions for writ of certiorari have been disposed of by the Supreme Court" (R. 3).

In response thereto, *amici curiae* urged that this Court had not, by its decision, touched the order of the Court of Appeals of June 15, 1944, vacating and setting aside the *Root* judgments (R. 5-6).

On its part, petitioner submitted its interpretation of the decision of this Court. Petitioner urged that this Court had found that the order appealed from and reversed (namely, the order of the Court of Appeals of December 29, 1944, allowing compensation, fees and expenses) depended for its validity upon the validity of the order upon which it was predicated, namely, the order of the Court of Appeals of June 15, 1944, setting aside the *Root* judgments (R. 7-11).

Petitioner further submitted that in strict conformity with the findings of this Court, the order of June 15, 1944, was a legal nullity and should be stricken from the record, but that, even though there were no adversary parties, peti-

tioner would consent that such order be resettled to provide for the setting aside of the *Root* judgments upon its consent and the dismissal of the appeals as moot (R. 10-11). It based its contention upon the following: (a) the settlement agreements between Root and petitioner, under the latter of which it was agreed that the decree of the district court be vacated and that the bills of complaint be dismissed (thus establishing that Root had no possible interest in further proceedings) and (b) the fact that none of the other oil companies, sued in other courts by petitioner for infringement of the same patents, could have a further interest for two reasons: (1) the cases in which pleas of *res adjudicata* had been set up by petitioner against the other oil companies had all been dismissed; and (2) the patents involved no longer had any materiality to anyone, since the Dubbs patent had expired in 1938 (and the statute of limitation therefore barred further actions thereon) and the Egloff patent had been held invalid by this Court (*Universal Oil Co.* v. *Globe Co.*, 322 U. S. 471).

Whilst this Court was considering a motion for rehearing upon its determination in 328 U. S. 575, *amici curiae* filed with this Court a supplement to their petition, in which they urged as a "cogent reason for granting the petition for rehearing" the above referred to contentions made by petitioner in response to the request of the Court of Appeals.

The petition for rehearing was denied by this Court on October 14, 1946 (329 U. S. 823).

Following the denial of said petition for a rehearing, *amici curiae* submitted to the Court of Appeals, through its clerk, on October 16, 1946, their further suggestions as to procedure. In that regard, *amici curiae,* while maintaining

that the Court of Appeals had authority to send down its mandate to the district court "dismissing the bill of complaint for unclean hands", suggested as an alternative that petitioner be afforded "an opportunity to have whatever it is that it contends it did not have before". *Amici curiae* stated that it would be appropriate for the Court of Appeals to issue an order "directed to Universal *and based on the whole record in the case,** to show cause why this Court should not enter a mandate directing a final decree dismissing the action because of fraud on the part of the plaintiff".** As indicated by their letter, it was their suggestion that, upon the return day of the order, petitioner be given the opportunity to bring before the court any evidence in its possession opposing the rule and to raise any question of the competency of any evidence in the previous record. *Amici curiae* also conceded that petitioner be given the opportunity to examine the files which the master had, prior to the hearings commenced in 1942, himself personally examined (R. 13-16).

It is perfectly clear that the suggestions of *amici curiae*, which subsequent events demonstrate, petitioner submits, have been adopted by the Court of Appeals in its orders now sought to be reviewed, contemplated that the old record, which this Court has found to have been made in violation of the constitutional rights of petitioner, should be made the basis of further hearings and that petitioner should merely be allowed to interpose objections or supplements to this informal record.

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*This record is the informal one made before the master and condemned by this Court as not affording the "usual safeguards of adversary proceedings" (328 U. S. 575, 580).

**Italics supplied throughout unless otherwise indicated.

Under date of October 18, 1946, in response to the aforesaid letter from *amici curiae,* petitioner's counsel wrote the Court of Appeals, through its clerk, restating its interpretation of the opinion of this Court and answering the suggestions of *amici curiae* above outlined.

Petitioner contended that this Court did hold that the order of June 15, 1944, in so far as it should be deemed to affect the property or rights of petitioner, denied petitioner due process of law and was not entered in an adversary proceeding, quoting from the opinion of this Court that the "difficulty [of *amici*] was to the fact that * * * Root had settled its controversy with Universal and was unwilling to disturb the agreement by an attempt to reopen the lawsuit", that "The other oil companies who were in litigation with Root insisted that they were neither formal nor substantial parties to the *Root* case" and that the moving attorneys "could not move on their behalf to have the *Root* decree vacated * * *" (R. 19).

Petitioner further pointed out to the Court of Appeals that the procedure suggested by *amici curiae* would

> "fly precisely in the face of the holding of the Supreme Court. There would still be no adversary parties before the Court and, consequently, no judgment affecting the rights and property of Universal could be entered. Furthermore, due process having been denied in the making of the record, that omission could not be cured by permitting Universal to present objections to bits of the record already made or to offer supplements thereto while leaving the record already made otherwise intact. The very vice which the Supreme Court pointed out would thus be perpetuated" (R. 19).

In summation of its position and the ***raison d'etre*** for its opposition to further harassment in this investigation, petitioner stated:

> "Only in a true adversary proceeding where a record is made in a court of competent jurisdiction in conformity with 'the usual safeguards of adversary proceedings' can that issue be determined against Universal or its property or rights.
>
> "It is respectfully suggested that the request by Amici for further consideration by this Court is merely another endeavor to utilize this Court as an instrument for the private gain of the private clients of Amici. After the entry of the order of December 29, 1944 and prior to the decision of the United States Supreme Court in this matter, Amici, as attorneys for private interests (as well as Arthur Logan of the Delaware Bar who claims to be one of them) commenced litigation against Universal Oil Products Company in Illinois, Delaware and New York. The aggregate damages claimed in these actions are several million dollars. In each of the actions the alleged fraud of Universal in connection with the *Root* case is made the cornerstone or one of the cornerstones for plaintiffs' alleged right of recovery. In view of the Supreme Court decision it is apparent that plaintiffs in these actions, in order to succeed, must there establish the fraud which they allege. Amici as attorneys for private interests should be left to the plenary suits already instituted and Universal should be permitted there in litigation conducted according to the requirements of due process of law to endeavor to vindicate its integrity"* (R. 19-20).

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*In addition to the foregoing, Skelly Oil Company, a Delaware corporation, is the defendant in an action commenced in the Dis-

In October, 1946, Skelly Oil Company (being the same company referred to in the footnote below) filed a petition with the Court of Appeals for leave to intervene in the *Root* matter "within the limits of the proposed pleading annexed hereto, to participate in any further proceedings in this Court or in the district court on the question whether there should be a dismissal for fraud" (R. 23). None of the allegations of the proposed pleading is directed toward any facts or issues in the patent litigation in the *Root* case, but all relate to further proceedings in the investigation, which was initiated in 1941 in the Court of Appeals by *amici curiae,* and are claimed to be material only with respect to the issues of fraud raised by Skelly Oil Company in the above-mentioned suits pending in Illinois and in the District Court of Delaware.

By order dated November 16, 1946, the Court of Appeals directed that a hearing be held on December 19, 1946,

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trict Court of Delaware for infringement of an entirely different patent. Judgment went for plaintiff in the latter court and was affirmed on appeal. Since about the year 1927, the accounting has been going on in that case. After the Court of Appeals had entered its order of June 15, 1944, setting aside the *Root* judgments, Skelly proposed to interpose in its case a defense of unclean hands, vitiating Universal's entire recovery and subjecting it to all of the expenses of Skelly Oil Company, said to involve hundreds of thousands of dollars. All this in spite of the fact that no claim has ever been advanced by Skelly that the judgments of the district court and of the Court of Appeals in that case, involving an entirely different patent from those involved in the *Root* case, are other than impeccable and unimpeachable.

In addition to the foregoing, another suit has been commenced in the state court in Delaware against petitioner claiming several hundred thousand dollars damages and predicated upon the alleged fraudulent nature of the *Root* judgments. Finally and more recently, a claim has been made in a Texas court which, if successful, would also involve petitioner in substantial damages.

at which time argument would be heard "as to the grounds asserted for dismissal of the suits [the *Root* case]", and granted leave to Skelly Oil Company to be heard in support of its petition for leave to intervene (R. 46).

On December 19, 1946, the hearing was conducted by the Court of Appeals, the entire court, with the exception of one judge, sitting *en banc* (R. 49).

At that hearing petitioner moved the Court of Appeals, upon all of the proceedings theretofore had and upon the aforementioned settlement agreements between it and Root, for an order vacating its order of June 15, 1944 (which set aside the *Root* judgments), and presented to the court a proposed order providing, in addition, that, upon consent of your petitioner, the *Root* judgments be vacated, the mandates of the Court of Appeals, issued on October 30, 1935, be recalled, the appeals be dismissed, and the causes remanded to the district court with directions to dismiss the bills of complaint pursuant to the stipulation of the parties upon the ground that the causes were moot.

Amici curiae, in their argument as to further steps to be taken, urged the same grounds contained in their letters, above summarized, to the clerk of the Court of Appeals. (For complete copies of these letters, see R. 5-6, 13-16, 50-76, 124-30).

Your petitioner opposed the petition of Skelly Oil Company for leave to intervene on several grounds: (a) that since the "investigation" was not a case or controversy within the court's jurisdiction, the intervention was improper; (b) that since both proposed intervenor and petitioner were Delaware corporations and no other independent ground for federal jurisdiction existed, permissive intervention was impossible; (c) that since intervention had not been sought in the district court, it was improper

for the first time in the Court of Appeals; and (d) that intervention was not timely since it was sought many years after the *Root* case had been concluded and settled and long after the initiation and disposition of the "investigation".

In its petition for leave to intervene, Skelly Oil Company summarized the three procedures submitted to the Court of Appeals for determining its final disposition of the *Root* matter: (a) "a dismissal of the appeals on the ground that they are moot, as suggested on Universal's part"; (b) "according to one of the suggestions of *Amici*, a dismissal for fraud on the basis alone of the present record and this Court's Order of June 15, 1944" and (c) "a further hearing, either in this Court or on remand, under a show cause order which, as we understand it, would treat the present evidence as creating at the least a *prima facie* case of fraud and would provide that a final disposition should not be made until after Universal has had an opportunity to rebut that *prima facie* case and overcome what it alleges were deficiencies of due process or regular trial procedure" (R. 24-5).

In the briefs and oral argument of counsel for Skelly Oil Company, the three foregoing propositions were submitted to the court.

It is perfectly clear from the minutes of the hearing (R. 139-40, 144-5, 147-8) that the order to show cause procedure, as contemplated both by the court and by the attorney for Skelly Oil Company, was to be one based upon the existing record made before the master, plus such additional evidence as petitioner should submit and subject to objections to evidence on the part of petitioner, with the clear understanding that, as counsel for Skelly Oil Company phrases it, "it is an order to show cause, which sort

of puts the burden on the person ordered to show cause" (R. 140).

It was in the light of this hearing and with this background that the Court of Appeals on June 20, 1947, entered the orders, portions of which are now sought to be reviewed, in which it required petitioner to show cause why the *Root* judgments should not be set aside for fraud and granted leave to Skelly Oil Company to intervene. It is abundantly clear from the context that the Court of Appeals proposes on October 13, 1947, to take the record heretofore made, which has been condemned by this Court as not protecting the constitutional rights of petitioner, and to place upon petitioner the burden of proving that it is not guilty of fraud.

On July 30, 1947, a formal withdrawal of appearance as *amici curiae* by Messrs. Thiess and von Holst* was filed with the Clerk of the Court of Appeals, with the approval of that court (R. 178-9).

Appearance in the *Root* case in the Court of Appeals for the United States of America, *amicus curiae,* has been filed by an Assistant Attorney General and two Special Assistants to the Attorney General (R. 180-1).

Petitioner has never conceded that it was directly or indirectly a party to any fraud upon the Court of Appeals. Indeed, it has denied and will continue to deny any such charge. Nor has it sought by any legal technicality to be relieved of the just penalty for any fraud since, as it is advised, it has not been found guilty thereof by due process of law. Its efforts are directed toward preventing those suing elsewhere from acquiring a short-cut proof of alleged fraud by means of a summary and *ex parte* proceeding, in

*Of the other *amici curiae,* Judge Denison died in May, 1942, and Mr. Logan has not been heard from since May 12, 1942.

clear excess of the court's jurisdiction and without due process of law, and toward meeting the issue of fraud head-on in one or more of the several justiciable controversies involving the fraud issue now pending against it in courts of competent jurisdiction.

Indeed your petitioner believes that in a legally constituted proceeding, where the ordinary rules of evidence were observed, where an atmosphere of hostility were lacking, and where the party charging fraud were obliged to prove that charge by a fair preponderance of the evidence and, above all, where the trier of the facts would not have access to sources of information denied to your petitioner,—no finding of fraud or corruption touching your petitioner could be made.

Your petitioner respectfully submits that it is entitled, before the odium of corrupting the judiciary and all the concomitants thereof (such as charges in other proceedings of unclean hands) attach to it, to have a plenary trial of the issues in accordance with established legal principles. It has not had such a trial to date and has no possibility of obtaining one under the orders sought to be reviewed.

Questions Presented

1. Did the Circuit Court of Appeals have jurisdiction to enter those portions of the orders of June 20, 1947, which are sought to be reviewed?

2. In view of the settlement by the parties to the *Root* case, was there a case or controversy within the meaning of Article III, Section 2, of the Constitution of the United States before the Circuit Court of Appeals at the time of the making of the orders of June 20, 1947?

3. In view of the fact that there were not before the court adverse parties asserting adverse legally cognizable interests, was there a case or controversy within the meaning of Article III, Section 2, of the Constitution of the United States before the Circuit Court of Appeals at the time of the making of the orders of June 20, 1947?

4. Do those portions of the orders of June 20, 1947, which require petitioner to show cause why the judgments of affirmance in the *Root* case should not be vacated for fraud deprive the petitioner of its property without due process of law in violation of the Fifth Amendment of the Constitution of the United States?

5. Do the portions, or any of them, of the orders of which review is sought deviate from the mandate of this Court in the above-entitled causes sent down under date of July 11, 1946?

6. Did the Circuit Court of Appeals err, as a matter of Constitutional as well as statutory and common law, in granting the application of Skelly for leave to intervene?

Reasons Relied On for the Allowance of These Writs

Exercise of the power of this Court to grant the writs of *certiorari* herein prayed for is sought upon the following grounds:

1. The Circuit Court of Appeals, in assuming jurisdiction to make the portions of the orders here sought to be reviewed, did so in a matter which did not constitute a case or controversy and, accordingly, acted in a manner

which is untenable and in conflict with the applicable decisions of this Court and of other Circuit Courts of Appeal.

2. The Circuit Court of Appeals, in assuming jurisdiction to make the portions of the orders here sought to be reviewed, did so in a matter in which there were no adverse parties asserting adverse, legally cognizable, interests and in so doing acted in a manner which is untenable and in conflict with the applicable decisions of this Court and of other Circuit Courts of Appeal.

3. The Circuit Court of Appeals, in assuming jurisdiction to make the portions of the orders here sought to be reviewed, purported to do so in cases which had become entirely moot, for (a) those cases had been completely settled by agreement of the parties making provision for vacation of the judgments rendered therein and for dismissal of the bills; and (b) their subject matter had ceased to exist as one of the two patents involved had expired and the other had been held invalid by this Court; and in so doing the court below acted in a manner which is untenable and in conflict with the applicable decisions of this Court and of other Circuit Courts of Appeal.

4. The Circuit Court of Appeals was wholly devoid of any jurisdiction or power to (a) direct petitioner to show cause why the judgments of the Circuit Court of Appeals in the *Root* case, entered June 26, 1935, should not be vacated and set aside for fraud or (b) grant Skelly leave to intervene, and the action of the said Court of Appeals in entering said orders to that effect is untenable and in conflict with the applicable decisions of this Court and of other Circuit Courts of Appeal.

5. The action of the Circuit Court of Appeals, in making that portion of the orders requiring petitioner to show cause why the judgments of affirmance in the *Root* case should not be set aside for fraud, deprived petitioner of its property without due process of law in violation of the Fifth Amendment of the Constitution of the United States and is in conflict with the applicable decisions of this Court and of other Circuit Courts of Appeal.

6. The question of whether the Circuit Court of Appeals had jurisdiction to make the portions of the orders here sought to be reviewed involves important questions of federal judicial administration and should therefore be resolved by this Court.

7. The action of the Circuit Court of Appeals in making those portions of the orders here sought to be reviewed constituted a deviation by that court from the mandates of this Court handed down under date of July 11, 1946, and such deviation is untenable and in conflict with the applicable decisions of this Court and of other Circuit Courts of Appeal.

8. The action of the Circuit Court of Appeals in making that portion of the orders granting leave to Skelly to intervene is, as a matter of Constitutional as well as statutory and common law, untenable and in conflict with the applicable decisions of other Circuit Courts of Appeal.

WHEREFORE, your petitioner respectfully prays that writs of *certiorari* be issued out of and under the seal of this Court directed to the Circuit Court of Appeals for the Third Circuit commanding that court to certify and to send to this Court for its review and determination, on a day

certain to be named therein, a full and complete transcript of the record of all of the proceedings in the investigation conducted in the consolidated cause numbered and entitled in its Docket Nos. 5648 and 5546, Root Refining Company, Defendant-Appellant, v. Universal Oil Products Company, Plaintiff-Appellee, since December 29, 1944 (the last date reviewed by this Court in *Universal Oil Co.* v. *Root Rfg. Co.*, 328 U. S. 575), and that those portions of the orders of the Circuit Court of Appeals for the Third Circuit of which review is hereby sought may be reversed by this Court and that your petitioner have such other and further relief in the premises as to this Court may seem just; and your petitioner will ever pray.

UNIVERSAL OIL PRODUCTS COMPANY,

Petitioner.

By: GEORGE A. BOCKMAN
Assistant Treasurer

RALPH S. HARRIS,
Attorney for Petitioner.

JOHN R. McCULLOUGH,
FREDERICK W. P. LORENZEN,
A. M. BYRD,
Of Counsel.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

GEORGE A. BOCKMAN, being duly sworn, deposes and says: that he is Assistant Treasurer of Universal Oil Products Company, the petitioner named in the foregoing petition; that he has read the foregoing petition and that the same is true to the best of his knowledge, information and belief.

(Signed) GEORGE A. BOCKMAN

Sworn to before me this
17th day of September, 1947.

CATHERINE F. O'KEEFE
Notary Public in the State of New York
Residing in Bronx County
Bronx Co. Clk's No. 22 Reg. No. 90-O-9
N. Y. Co. Clk's No. 281 Reg. No. 257-O-9
Kings Co. Clk's No. 12 Reg. No. 158-O-9
Q'ns Co. Clk's No. 2437 Reg. No. 129-O-9
Richmond Co. Clk's No. 3-O
Cert. Filed in Westchester Co.
Nassau Co. Clk's No. 9-O-49
Commission Expires March 30, 1949

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

UNIVERSAL OIL PRODUCTS COMPANY, *Petitioner,* v. ROOT REFINING COMPANY and SKELLY OIL COMPANY, *Respondents.*	No.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI

Orders Below

The orders of the Court of Appeals dated June 20, 1947, are set forth at pages 174-7, of the transcript of the record filed herewith.*

Jurisdiction

The facts supporting the jurisdiction of this Court are set forth in the petition.

Cases believed to sustain the jurisdiction of this Court are as follows:

Universal Oil Co. v. *Root Rfg. Co.*, 328 U. S. 575;

*References styled "R. " are to pages in the certified record accompanying this petition; references styled "v. , p. " are to pages of the certified record in cause numbered 48, October Term, 1945, incorporated by reference.

Trade Comm'n v. *Goodyear Co.*, 304 U. S. 257;
Aetna Life Ins. Co. v. *Haworth*, 300 U. S. 227;
Willing v. *Chicago Auditorium*, 277 U. S. 274;
U. S. v. *California Canneries*, 279 U. S. 553.

Statement of Facts

The facts are sufficiently set forth in the petition.

Specification of Errors

If the writs are granted, petitioner will urge that the Circuit Court of Appeals erred in the following respects:

1. In assuming jurisdiction to make and enter the orders dated June 20, 1947,* in a matter which did not constitute a case or controversy within the meaning of Article III, Section 2, of the Constitution of the United States.

2. In assuming jurisdiction to make and enter the orders dated June 20, 1947, in a matter in which there were no adverse parties with legally cognizable adverse interests.

3. In assuming jurisdiction to make and enter the orders dated June 20, 1947, although the causes in which the orders were captioned had become entirely moot, for

*Unless otherwise indicated, reference throughout this brief to the orders dated June 20, 1947, is a reference to those portions of the orders as to which review is sought, *viz.*, that requiring petitioner to show cause, "if any there be", why the judgments of affirmance in the *Root* case should not be vacated by reason of alleged fraud and that permitting Skelly Oil Company to intervene.

(a) they had been completely settled by agreement of the parties making provision for vacation of the judgments rendered therein and for dismissal of the bills; and (b) their subject matter had ceased to exist as one of the two patents involved had expired and the other had been held invalid by this Court.

4. In making and entering the orders dated June 20, 1947, captioned in the consolidated cause entitled *"Root Refining Company, Defendant-Appellant, vs. Universal Oil Products Company, Plaintiff-Appellee"*, directing your petitioner to show cause why the judgments of the Circuit Court of Appeals entered on June 26, 1935, should not be set aside and vacated for fraud practiced upon the court, thereby acting contrary to the requirements of due process of law.

5. In making and entering the orders dated June 20, 1947, captioned in the consolidated cause entitled *"Root Refining Company, Defendant-Appellant, vs. Universal Oil Products Company, Plaintiff-Appellee"*, granting Skelly Oil Company leave to intervene for the first time in the appellate court, although there was no case or controversy before the court and Skelly had not sought to intervene in the district court, did not present any issue of law or fact in common with the *Root* case and presented no independent ground for federal jurisdiction.

6. In deviating from the mandate of this Court, dated July 11, 1946, by making and entering the orders dated June 20, 1947.

POINT I.

THE CIRCUIT COURT OF APPEALS, IN ASSUMING JURISDICTION TO MAKE AND ENTER THE ORDERS DATED JUNE 20, 1947, ACTED CONTRARY TO THE DECISIONS OF THIS COURT AND OF OTHER CIRCUIT COURTS OF APPEAL.

The jurisdiction of the courts of the United States is limited by the Constitution to cases or controversies (Constitution, Article III, Section 2). The case or controversy must be actual. *Coffman* v. *Breeze Corporations,* 323 U. S. 316; *Aetna Life Ins. Co.* v. *Haworth,* 300 U. S. 227; *Willing* v. *Chicago Auditorium,* 277 U. S. 274; *Liberty Warehouse Co.* v. *Grannis,* 273 U. S. 70; *New Jersey* v. *Sargent,* 269 U. S. 328; *Muskrat* v. *United States,* 219 U. S. 346; *Smith* v. *American Asiatic Underwriters, Federal,* 9 Cir., 127 F. (2d) 754. The powers of the court invoked must be strictly judicial in nature. *Muskrat* v. *United States,* 219 U. S. 346; *Lord* v. *Veazie,* 8 How. 251; *Osborn* v. *U. S. Bank,* 9 Wheat. 738. An absolute *sine qua non* of an actual controversy is the initial and continued existence of adverse parties asserting adverse interests. *Universal Oil Co.* v. *Root Rfg. Co.,* 328 U. S. 575; *Muskrat* v. *United States,* 219 U. S. 346; *South Spring Gold Co.* v. *Amador Gold Co.,* 145 U. S. 300; *Cleveland* v. *Chamberlain,* 1 Black 419; *Lord* v. *Veazie,* 8 How. 251; *O'Donnell* v. *United States,* 9 Cir., 91 F. (2d) 14. A party must assert a personal and private interest, as opposed to one asserted *pro bono publico. Liberty Warehouse Co.* v. *Grannis,* 273 U. S. 70; *New Jersey* v. *Sargent,* 269 U. S. 328; *Massachusetts* v. *Mellon,* 262 U. S. 447; *Fairchild* v. *Hughes,* 258 U. S. 126; *State of Georgia* v. *Stanton,* 6 Wall. 50; *Osborn* v. *U. S. Bank,* 9 Wheat. 738.

Judged by these principles, the portions of the orders of the Circuit Court of Appeals dated June 20, 1947, of which a review is sought, were not entered in a case or controversy within the meaning of the Constitution and, consequently, the Circuit Court of Appeals was without power to make or enter such portions of said orders.*

Although the orders dated June 20, 1947, were captioned in the *Root* case, no controversy had for years existed between Root and petitioner, the only parties thereto. Root had settled its controversy with petitioner by the settlement agreements of April 1, 1939, and July 28, 1944 (R. 161-73). Root declined to make itself a party or to permit itself to be made a party to the investigation although counsel for petitioner, prior to the entry of the order of the Circuit Court of Appeals dated June 15, 1944, in which the Circuit Court of Appeals purported to set aside the *Root* judgments, offered, if Root desired to be heard upon the question as a party, to preserve to Root the settlement and to consent to the setting aside of the judgments and the reargument of the appeals (see 328 U. S. at pp. 577-8).

Thus any controversy which may at one time have existed between Root and petitioner had become moot long prior to the entry of the orders dated June 20, 1947. The Circuit Court of Appeals, therefore, was without power to make or enter those portions of the orders here sought to be reviewed. *St. Pierre* v. *United States,* 319 U. S. 41; *Alejandrino* v. *Quezon,* 271 U. S. 528; *Brownlow* v.

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*Of course, that portion of the orders which vacated the Court of Appeals' order of June 15, 1944, was within its power. A federal court, lacking any other jurisdiction, always has power, either on notice or *sua sponte* to vacate its judgments and dismiss actions for lack of jurisdiction. *M. C. & L. M. Railway Co.* v. *Swan,* 111 U. S. 379, 382; *Great Southern Fire Proof Hotel Co.* v. *Jones,* 177 U. S. 449, 453.

Schwartz, 261 U. S. 216; *American Book Co.* v. *Kansas,* 193 U. S. 49; *Mills* v. *Green,* 159 U. S. 651.

It is clear from the pronouncements of this Court that where litigants at any stage of the proceedings settle their differences, the settlement agreement completely extinguishes the causes of action and any judgments entered thereon and the court is thereby rendered powerless to act thereafter, except to dismiss for lack of jurisdiction. *Dakota County* v. *Glidden,* 113 U. S. 222; *Buck's Stove &c. Co.* v. *Am. Fed. of Labor,* 219 U. S. 581; *Paradise Land & Livestock Co.* v. *Federal Land Bank, Etc.,* 10 Cir., 147 F. (2d) 594, *cert. den.* 326 U. S. 717; *Walling* v. *Shenandoah-Dives Mining Co.,* 10 Cir., 134 F. (2d) 395. *Cf. Smallwood* v. *Gallardo,* 275 U. S. 56; *Gallardo* v. *Santini Co.,* 275 U. S. 62; *United States* v. *Alaska S. S. Co.,* 253 U. S. 113, 116.

Under the foregoing authorities the court below, in the absence of adversary parties and in the absence of a case or controversy, had no power to take any effective juridical action binding upon petitioner's property rights, whether by way of ordering petitioner to show cause why judgments which had been encompassed in the settlements should not be set aside for fraud or of permitting intervention.

But this does not mean that the Court of Appeals, even where no case or controversy exists, lacks the power "to unearth such a fraud" perpetrated against it and "to unearth it effectively" (328 U. S. at p. 580).

The court may act effectively in a variety of ways. For example:

1. it may spread upon its record the testimony taken in the investigation and the report of its investigator;

2. it may approve such report and give publicity thereto;

3. it may commence disciplinary proceedings against officers of the court;

4. it may suggest or cause the commencement of contempt of court proceedings; and

5. it may make available to public prosecutor and private litigant alike the testimony and the report.

The foregoing, we respectfully submit, would constitute, even in the absence of a case or controversy, an effectual unearthing of fraud against the court, without doing violence to established principles of due process of law and should fully satisfy the strictest requirements of a court properly jealous of its honor. Under the circumstances here presented the investigation should surely not be given any greater effect than an indictment.

POINT II.

THE ORDERS OF JUNE 20, 1947, DIRECTING UNIVERSAL TO SHOW CAUSE WHY THE JUDGMENTS IN THE *ROOT* CASE SHOULD NOT BE VACATED FOR FRAUD ARE VOID BECAUSE THE CIRCUIT COURT OF APPEALS ACTED WITHOUT JURISDICTION AND DEPARTED COMPLETELY FROM THE REQUIREMENTS OF DUE PROCESS OF LAW.

(A) The court acted without jurisdiction.

Since the instant proceeding did not constitute a legally cognizable case or controversy, the Circuit Court of Appeals was manifestly without power to make and enter the orders directing Universal to show cause why the *Root* judgments should not be vacated for fraud. The decisions of this Court heretofore referred to in Point I make it

unnecessary to argue again the proposition that, absent a case or controversy within the meaning of the Constitution, a federal court is totally powerless to take any step such as that contemplated by the orders of the Circuit Court of Appeals.

Moreover, the Circuit Court of Appeals, in requiring petitioner to show cause why the judgments in the *Root* case should not be set aside for fraud, deviated from the mandate of this Court, dated July 11, 1946, which directed the Circuit Court of Appeals to enter a judgment in conformity with the opinion of this Court and commanded that such execution and proceedings be had in the cause, in conformity with the opinion and judgment of this Court, as according to right and justice ought to be had. This Court, in its opinion, held that petitioner's rights could not be adjudicated in the instant investigation, in which the usual safeguards of adversary proceedings were not observed. The Circuit Court of Appeals, in the continuing absence of an adversary proceeding, has once again purported to enter orders affecting Universal's property rights solely on the basis of the "investigation"; unless the investigation be deemed by the court below to be binding, at least *prima facie*, upon petitioner, it is inconceivable that the Court would undertake to compel petitioner to show cause why the judgments in the *Root* case should not be vacated for fraud. Indeed, it is plain from the stenographer's minutes of the hearing preceding the orders of June 20, 1947, that the intervenor and the court below both intended, by means of an order to show cause, to utilize the results of the "investigation" not merely as a guide for the introduction of evidence or even as a sort of indictment against petitioner, but as *prima facie* proof of petitioner's guilt (R.

139-40, 144-5, 147-8). The action now complained of is, therefore, as improper as was the order of December 29, 1944, which was reviewed and condemned by this Court in its opinion of June 10, 1946.

(B) The orders of June 20, 1947, violate the concepts of due process of law.

This Court, in its previous decision (328 U. S. 575) condemned the action of the Circuit Court of Appeals designed to affect petitioner's property rights and judgments by means of an investigation in which petitioner did not have such opportunity to be heard as is accorded to parties in adversary proceedings. But the Circuit Court of Appeals, on the basis of the identical record condemned by this Court, has directed petitioner to show cause "if any there be" why the *Root* judgments should not be vacated for fraud. A court may not, without a hearing, merely upon the charge of a stranger, without any issues being framed in proper pleadings, and upon information not properly a part of the record, shoulder petitioner with the burden of proving itself innocent of the alleged fraud. The concept of due process, expressed in many opinions of this Court, condemns such practice. *Universal Oil Co.* v. *Root Rfg. Co.*, 328 U. S. 575; *Morgan* v. *United States*, 304 U. S. 1, 19; *Norwegian Nitrogen Co.* v. *U. S.*, 288 U. S. 294; *U. S.* v. *Abilene & So. Ry. Co.*, 265 U. S. 274; *Int. Com. Comm.* v. *Louis. & Nash. R.R.*, 227 U. S. 88; *Windsor* v. *McVeigh*, 93 U. S. 274. The procedure adopted by the Circuit Court of Appeals is so contrary to accepted standards of judicial action as to constitute a deprivation of your petitioner's property without due process of law and to require, in the public interest, a review by this Court.

We respectfully submit that the action taken by the Circuit Court of Appeals departs as completely from established modes of procedure governing litigation as did that of the lower court in *Windsor* v. *McVeigh*, 93 U. S. 274.

It should be noted that the orders here sought to be reviewed do not grant to petitioner the right to have the issue of its alleged fraud determined upon pleadings duly filed nor does it allow trial by jury, if necessary, of controverted issues of fact. On the contrary, the orders, for which review is sought, are summary orders to show cause, patently based upon the record heretofore made, requiring petitioner to prove its innocence although it has never been convicted in any judicially cognizable case or controversy pursuant to the requirements of due process of law. Furthermore, the orders deprive petitioner of its right to be heard on appeal, for it permits the Appellate Court in the first instance to determine the question at issue. Indeed, the orders demonstrate the danger of permitting a departure from established judicial procedure every time the cry of fraud is raised. It is particularly important to preserve the requirements of due process of law when the charge against a party is offensive in character. But the court below seems so overwhelmed by the charge of fraud upon it that it will not permit the matter to be determined by adversary litigation conducted according to constitutional requirements in a proper forum. Against such excess of judicial zeal, this Court should interpose its mandate before irreparable injury is done to the entire federal judicial system and petitioner is destroyed by a judicially sanctioned, but unestablished, stigma of fraud.

Petitioner most earnestly submits that until a controversy legally cognizable by the federal courts has been com-

menced, and until a trial of the issues therein has been conducted in accordance with the recognized principles of law governing such cases, it should not be subjected to a purported "adjudication" finding it guilty of fraud and thus seriously affecting its property rights. Cases involving millions of dollars of claimed damages are pending against petitioner as a result of the abortive "investigation" heretofore conducted by the court below. The plaintiffs in these cases are waiting hopefully for another "determination" of fraud against petitioner in further proceedings below wherein petitioner will not have the benefits of adversary procedure and due process of law. Such plaintiffs are not entitled to such advantage but should litigate the alleged fraud with petitioner pursuant to the requirements of due process of law. Petitioner is prepared to litigate any such proper case upon the merits in accordance with law and to be bound by the outcome thereof.

POINT III.

THE CIRCUIT COURT OF APPEALS, IN GRANTING LEAVE TO SKELLY OIL COMPANY TO INTERVENE, ACTED WITHOUT JURISDICTION AND IN A MANNER CONTRARY TO THE DECISIONS OF THIS COURT AND OF OTHER CIRCUIT COURTS OF APPEAL.

During the investigation conducted by *amici curiae* and at the prior argument before this Court, *amici curiae* purported to act on behalf of Skelly Oil Company, among others. But these oil companies, including Skelly, "insisted that they were neither formal nor substantial parties to the *Root* case" and they "did not subject themselves to the court's jurisdiction" either in that case or in the course of the investigation (see 328 U. S. at pp. 577-578). Not until

Skelly was assured of the conclusion which the court below would reach in connection with the alleged fraud which was the subject matter of the investigation did it, at a very late date and long after the investigation had been completed, endeavor, by the petition which is one of the bases of the orders here complained of, to become a party which could take advantage of the conclusion which we contend was improperly reached by the court below.*

Irrespective of the inherent inequity of Skelly's position it is plain that as a matter of law the court below had no jurisdiction and no right to permit the intervention. The proceeding before the Court of Appeals has not changed in character since the previous decision by this Court (328 U. S. 575). When the order granting the petition for intervention was made, the Court of Appeals did not have before it an adversary proceeding between adverse parties asserting adverse interests. As we have shown in the first point of this brief, whatever causes of action and judgments thereon had originally existed between Root and petitioner, had been extinguished by the settlements and the causes had been rendered moot. In this state of the record there was no case or controversy in which the Court of Appeals could permit Skelly Oil Company to intervene.**

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*Even if there were a case or controversy here involved, the intervention permitted below at this late date is contrary to the weight of authority. *Roberts* v. *Metropolitan Life Ins. Co.*, 7 Cir., 94 F. (2d) 277, 281; *American Brake Shoe & F. Co.* v. *Interborough R. Tr. Co.*, 2 Cir., 112 F. (2d) 669; *Baltimore Trust Co.* v. *Interocean Oil Co.*, D. Md., 30 F. Supp. 484, 485; *The American Eagle*, D. Del., 28 F. (2d) 1000, 1001.

**Surely, Skelly Oil Company would not presume to contend that it seeks to intervene in a controversy between petitioner and the Circuit Court of Appeals for the Third Circuit, or the Judges thereof. A controversy of that nature, with one of the parties in the dual role of prosecutor and judge, would violate the most fundamental principles of American jurisprudence.

Since the existence of a case or controversy is a prerequisite to intervention, the Court of Appeals had no jurisdiction to make and enter the orders granting leave to intervene. *Kendrick* v. *Kendrick*, 5 Cir., 16 F. (2d) 744, 745, *cert. den.* 273 U. S. 758; *Godfrey L. Cabot, Inc.* v. *Binney & Smith Co.*, D. N. J., 46 F. Supp. 346, 347; *Haase* v. *Haase*, 261 Ill. 30, 32, 103 N. E. 628.

But it would appear that the Court of Appeals, in granting Skelly Oil Company leave to intervene, has sought to cure this fundamental jurisdictional defect in this proceeding by permitting Skelly to "lift itself by its own bootstraps". One seeking to intervene must, at the time of his petition, have a legal interest in an existing case or controversy. Lacking an existing case or controversy, the Court of Appeals has, in effect, attempted to create such a case or controversy by permitting Skelly Oil Company to intervene on the ground that it had an interest. The obvious defect in the reasoning is, of course, that any interest which Skelly Oil Company could possibly have had was not in any preexisting case or controversy but in the case or controversy which the court purported to create for the first time on the basis of Skelly Oil Company's alleged claim of right to intervene. To put it another way, prior to the intervention of Skelly there was no "fraud issue" in the *Root* case; there were no pleadings and, accordingly, no issue on the question of fraud. The pleadings in the *Root* case dealing exclusively with the Dubbs and Egloff patents had no relationship whatever to the issues in the case in which Skelly Oil Company was interested for its litigation in the Delaware District Court dealt with an entirely different patent (R. 37-43). Skelly Oil Company interjected the issue of alleged fraud in obtaining the *Root*

judgments into the Skelly patent litigation by a plea of unclean hands (although entirely different patents were involved) and then was permitted to justify its intervention in the *Root* case on the theory that the intervention in that case injected the same issue therein.

If Skelly may only intervene with respect to an existing issue, how can it be permitted to intervene for the purpose of creating such an issue?

In any event, even if it be assumed, *arguendo,* that the intervention of Skelly Oil Company could create a case or controversy, it is clear that such case or controversy would be a proceeding separate and distinct from any between the original parties to the *Root* case. Such an independent controversy between Skelly Oil Company and petitioner involving whether or not fraud was committed in the *Root* case and the consequences thereof, may not be litigated in a federal court in the absence of diversity of citizenship or some other ground of federal jurisdiction. No such diversity of citizenship would exist in that controversy for both Skelly Oil Company and petitioner are Delaware corporations (R. 32; v. I, p. 115) and no other federal jurisdictional ground has been suggested. The granting of the petition for leave to intervene would, therefore, automatically divest the Circuit Court of Appeals of jurisdiction, even if it be assumed that it otherwise had such jurisdiction. *Cochrane* v. *W. F. Potts Son & Co.*, 5 Cir., 47 F. (2d) 1026; 2 Moore, *Federal Practice*, p. 2333. *Cf. Fulton Bank* v. *Hozier*, 267 U. S. 276.

In addition, the orders granting leave to intervene are contrary to the rule, obtaining in many other Circuit Courts of Appeal, that intervention will not be permitted for the first time in an appellate court. *Wenborne-Karpen Dryer Co.* v. *Cutler Dry Kiln Co.*, 2 Cir., 292 Fed. 861;

Veitia v. *Fortuna Estates,* 1 Cir., 240 Fed. 256; *Morin* v. *City of Stuart,* 5 Cir., 112 F. (2d) 585. See *Smith* v. *American Asiatic Underwriters,* 9 Cir., 134 F. (2d) 233, 236. *Cf. United States* v. *Patterson,* 15 How. 10.

Conclusion

For the foregoing reasons, it is submitted that the petition should be allowed and that the portions of the orders dated June 20, 1947, herein complained of, entered by the Circuit Court of Appeals for the Third Circuit, should be reviewed and reversed.

Respectfully submitted,

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763680—47

In the Supreme Court of the United States

OCTOBER TERM, 1947

Nos. 352–353

UNIVERSAL OIL PRODUCTS COMPANY, PETITIONER

v.

ROOT REFINING COMPANY AND SKELLY OIL COMPANY

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 102 Misc.

UNIVERSAL OIL PRODUCTS COMPANY, PETITIONER

v.

ROOT REFINING COMPANY AND SKELLY OIL COMPANY

ON MOTION FOR LEAVE TO FILE A PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 103 Misc.

UNIVERSAL OIL PRODUCTS COMPANY, PETITIONER

v.

HONORABLE JOHN BIGGS, ET AL.

ON MOTION FOR LEAVE TO FILE A PETITION FOR WRITS OF PROHIBITION AND MANDAMUS

MEMORANDUM FOR UNITED STATES AS AMICUS CURIAE

STATEMENT

The Universal Oil Products Company seeks by petition for writs of certiorari under Judicial Code 240 (a) (Nos. 352–353) and by motions for leave to file a petition for writs of certiorari (Nos. 102, Misc.) and leave to file a petition for writs of prohibition and mandamus under Judicial Code 262 (No. 103, Misc.) to review those portions of the orders of the Circuit Court of Appeals for the Third Circuit (1) directing petitioner to show cause why that court's judgments, entered on June 26, 1935, should not be set aside and vacated by reason of alleged fraud and corruption practiced upon the court by petitioner or those acting on its behalf,[1] and (2) granting the Skelly Oil Company leave to intervene (R. 174–177).[2] The orders also vacate the court's orders of June 15, 1944, setting aside and vacating its judgments

[1] The return day of the orders was October 13, 1947. By subsequent order, the return day has been postponed until 30 days after the disposition of these petitions and motions by this Court.

[2] The records filed in each case are identical both in contents and pagination. The various motions and petitions are likewise in large measure identical, although the pagination does differ. All references are to the record and petition in Nos. 352–353.

entered on June 26, 1935, and authorize the Attorney General of the United States or some member of the staff of the Department of Justice designated by him to appear as *amicus curiae*. These orders were issued by the court below in connection with proceedings subsequent to this Court's opinion and mandate in *Universal Oil Products Co.* v. *Root Refining Co.*, 328 U. S. 575. The pertinent facts as there summarized follow:

In 1929 and 1931, Universal Oil Products Company brought suits for patent infringement against Winkler-Koch Engineering Co. and the Root Refining Co., respectively. The suits were consolidated and the patents held valid and infringed. 6 F. Supp. 763. The Circuit Court of Appeals for the Third Circuit, in an opinion written by Judge J. Warren Davis, affirmed (78 F. 2d 991), and this Court denied certiorari, 296 U. S. 626. In 1939, Universal and Root arrived at an agreement attempting to settle their controversy.[3]

On June 5, 1941, the attorneys, who had represented Root and were then representing other oil companies against which petitioner had instituted similar infringement suits on the basis of the *Root* decrees, suggested to the Circuit Court of Appeals for the Third Circuit that the testimony taken at Judge Davis' trial pointed to his bribery by one Morgan S. Kaufman to obtain

[3] On July 28, 1944, Universal and Root entered a further settlement agreement. (R. 170.)

decisions favorable to Universal in the *Root* appeals and urged the court to inquire further into the matter. Since Root had settled its controversy with Universal and did not wish to take any steps to reopen the proceedings and since the other oil companies insisted they were neither formal nor substantial parties to the *Root* cases, the Court in order to give these attorneys status in the proceedings appointed them *amici curiae,* although the attorneys were also concerned with the interests of their private clients.

At the suggestion of the *amici curiae,* the court appointed a master to inquire into the circumstances surrounding the *Root* decrees. The master held extensive hearings, at the conclusion of which he submitted a report concluding that the *Root* decrees were tainted and invalidated by fraud. On the basis of this report, the court below by orders dated June 15, 1944, directed the judgments be vacated and the causes reargued.

On July 24, 1944, the *amici* asked the court to assess against Universal their expenses and reasonable attorneys' fees. After an oral hearing, the court sitting *en banc,* two judges dissenting, on December 29, 1944 awarded the *amici* $54,606.57 as expenses and $100,000 as reasonable compensation, 147 F. 2d 259. Petitioner sought review of the order of December 29, 1944 by applying for writs of certiorari under Judicial Code 240 (a) and 262, and for leave to file petitions for mandamus and prohibition. The writs

of certiorari were granted (324 U. S. 839), but leave to file petitions for mandamus and prohibition was denied, 324 U. S. 826. After briefs were filed and argument had, this Court in its opinion concluded that the order of December 29, 1945, awarding compensation to the *amici* was invalid. It dismissed the writ of certiorari invoked under Judicial Code 262 but under the writ of certiorari issued under Judicial Code 240 (a) it reversed and remanded the cause to the court below for the entry of a judgment in conformity with the opinion. A petition for rehearing alleging ambiguity in the Court's opinion was denied on October 14, 1946. 329 U. S. 823.

By letters dated June 20, 1946, the court below, through its clerk invited the suggestions of petitioner and of *amici* as to "the present status of the appeals" in the *Root* cases, "now that the petitions for writ of certiorari have been disposed of by the Supreme Court," (R. 3). The requested suggestions were submitted (R. 5–21). On October 29, 1946, the Skelly Oil Company filed petitions for leave to intervene "to participate in any further proceedings in this Court or in the district court on the question whether there should be dismissal for fraud" (R. 23). A hearing was had before the court below, sitting *en banc*, with the exception of one judge, at which hearing petitioner, *amici curiae*, and counsel for Skelly advanced various suggestions as to the permissible further procedure to be followed. On

June 20, 1947, the court below issued the orders here involved (R. 174–177). Appearances of the former *amici curiae* were withdrawn on July 30, 1947 (R. 178–179), and the appearances of members of the staff of the Department of Justice as *amici curiae* were entered (R. 180–181).

DISCUSSION

Apart from the question of the propriety of action of the court below in permitting Skelly Oil Company to intervene, as to which the United States takes no position, the basic question raised by the various motions and petitions filed by petitioner in this case is whether in light of the decision of this Court in *Universal Oil Products Co.* v. *Root Refining Co.*, 328 U. S. 575, the court below properly directed petitioner to show cause why its judgments of June 26, 1935, should not be vacated by reason of alleged fraud and corruption.[4] Petitioner has consented to the vacation of these judgments (Pet. 7–8), and has urged the court below to dismiss the appeals not for fraud but as moot on the grounds that Root is no longer interested in the proceedings and that of the two patents involved, one had expired and the other declared invalid (*Universal Oil Co.* v. *Globe Co.*, 322 U. S. 471). Thus, petitioner's objections are addressed not to the vacation of the judgments but

[4] Petitioner does not question that portion of the orders authorizing the Attorney General or members of his staff to appear as *amicus*, nor could any such question be raised in the light of this Court's prior opinion.

rather to the possibility that the court below might ground the vacation on fraud or bribery and apply the doctrine of unclean hands.

Petitioner's contentions opposing such action by the court below are based on its construction of this Court's opinion in 328 U. S. 575. These contentions which are reiterated in the same language in each of petitioner's motions and petitions filed in the present proceeding are (1) the orders to show cause deviated from this Court's mandate in the prior proceeding (Pet. 30); (2) that there was no case or controversy pending before the court below when it entered its orders of June 20, 1947, and therefore, the court was without jurisdiction to proceed, except to dismiss the appeals (Pet. 26–31); and (3) that the orders to show cause deprive petitioner of property without due process of law (Pet. 31–33). We believe that petitioner has erroneously interpreted this Court's decision, and that its contentions accordingly are without merit.

1. As we read the opinion in 328 U. S., this Court was passing directly only on the order of December 29, 1944, allowing compensation to the then *amici curiae*. It was expressly stated in the opinion that the orders of June 15, 1944, setting the judgments aside for fraud were not before the Court and that the Court was not passing directly on those orders (328 U. S. at 580). The mandate was accordingly addressed only to the order of December 29, and not to the orders of June 15; noth-

ing in the mandate required the court below either to vacate the orders of June 15, or to take any further proceedings in regard thereto. Obviously then, the vacation of these orders and the undertaking of further proceedings initiated by issuance of the show cause orders did not conflict with this Court's mandate and therefore there is no occasion for this Court to grant the petition for writs of mandamus and prohibition for the purpose of compelling the court below to act in accordance with, and not in contravention of, the mandate.

2. Presumably in view of the doubts expressed by this Court as to the propriety of the hearings leading up to the orders of June 15, the court below vacated, *sua sponte,* these orders. In issuing the show cause orders the court below was initiating proceedings plainly intended to obviate any infirmities which might have vitiated the prior proceedings. The further proceedings contemplated are clearly within the jurisdiction of the court below, despite the refusal of the defendant actively to participate. At the present posture of the case, all that the court below has done is to issue the show cause orders. These orders, we believe, do not themselves contain any of the infirmities which this Court suggested in its opinion.

(a) Petitioner urges that the court below, by issuing the show cause orders has manifested an intention to determine petitioner's rights to the prior judgments notwithstanding the absence of

a "case or controversy." This, petitioner claims, is contrary to the opinion of this Court in 328 U. S. 575 and requests the issuance of common law writs of certiorari to correct such excess of jurisdiction. Cf. *U. S. Alkali Assn.* v. *United States,* 325 U. S. 196. But as we read this Court's opinion, there is nothing express or implied therein requiring the existence of a classical "case or controversy" with adverse plaintiff and defendant in a proceeding to set aside a judgment obtained by fraud or corruption. All that is required is that if the result of the investigation is to deprive the successful party of a judgment, he must be accorded the usual safeguards of an adversary proceeding. Petitioner confuses the safeguards of an adversary proceeding which is based on due process with the jurisdictional requirement of an adversary proceeding, stemming from a "case or controversy."

The Court's statement that "the inherent power of a federal court to investigate whether a judgment was obtained by fraud, is beyond question," (328 U. S. at 580) supported by the citation of *Hazel-Atlas Co.* v. *Hartford Co.,* 322 U. S. 238, indicates, we believe, the fallacy in petitioner's contention for in the *Hazel-Atlas* case, this Court pointed out (p. 246):

> * * * tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in

> which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.

Moreover, in the prior proceeding, petitioner invoked the common law writ of certiorari on this very basis. Although that writ was initially granted (324 U. S. 839), this Court after further consideration dismissed the writ while reversing the cause under the writ of certiorari invoked under Judicial Code 240 (a). 328 U. S. at 581. This, we submit, demonstrates that the Court did not hold that the orders below contained a jurisdictional infirmity and accordingly petitioner's motion for leave to file a petition for common law writs of certiorari should be denied.

(b) Nor is there any reason to grant the writs of certiorari invoked under Judicial Code 240 (a). The mere issuance of show cause orders by the court below does not violate "the usual safeguards of adversary proceedings [which] must be observed" in such an investigation. Petitioner contends that by issuing the orders in this form, the court below has adopted the suggestion advanced below that the master's report be used as the basis of these further proceedings (Pet.

30–32). Such procedure, petitioner urges, would violate the safeguards to which it is entitled. But although this Court indicated that the orders could not properly constitute the sole basis of a finding of fraud, we see nothing in the opinion requiring the court below to disregard entirely the master's report or the record made before him and foreclosing their use as the starting point for further proceedings. In any case, the show cause orders do not indicate what procedure the court below intends to follow in according petitioner the usual safeguards of an adversary proceeding. Since the court below has merely issued show cause orders which are only interlocutory, and do not themselves violate the safeguards of adversary proceedings, and since petitioner will on a complete record have ample opportunity to raise questions of possible violation of these safeguards at the completion of such further proceedings, we suggest that there is no reason at this time to review those orders.

3. Thus, the issuance of the orders directing petitioner to show cause why the judgments of June 26, 1935 should not be set aside for fraud and corruption, contravenes neither the opinion of this Court in 328 U. S. 575, as we construe it, nor the mandate entered pursuant thereto. If, however, we have misread the opinion, we urge this Court to undertake clarification at this time by granting petitioner's motion either for leave to file petition for writs of prohibition and mandamus or for

leave to file petition for common law writs of certiorari, since it is a matter of importance in judicial administration that the scope and limitations of a court's power to vacate judgments allegedly tainted by fraud and corruption be clearly defined.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

OCTOBER 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1947

In the Supreme Court of the United States

OCTOBER TERM, 1947.

Nos. 352-353.

UNIVERSAL OIL PRODUCTS COMPANY,
Petitioner,

vs.

ROOT REFINING COMPANY AND SKELLY OIL COMPANY.

MOTION FOR LEAVE TO FILE MEMORANDUM AS AMICUS CURIAE

and

MEMORANDUM.

LESLIE NICHOLS,
1759 Union Commerce Bldg.,
Cleveland 14, Ohio.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 8647

CONTENTS.

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LESLIE NICHOLS hereby respectfully requests permission of the Court to file, as amicus curiae and in connection with these proceedings, the attached memorandum.

LESLIE NICHOLS,
1759 Union Commerce Building,
Cleveland 14, Ohio.

MEMORANDUM OF AMICUS CURIAE.

STATEMENT.

These proceedings having come to the attention of amicus curiae, he has felt his duty to this Court impels him to place before it certain matters within his knowledge which bear heavily upon the existence of a controversy with adversary parties. It is observed that the jurisdiction of the United States Circuit Court of Appeals for the Third Circuit is challenged largely upon the ground that there were not before it "adverse parties asserting adverse legally cognizable interests." But it does not follow that there are not parties who, while not formally of record, yet are in legal effect parties to the entire proceeding and whose interests are strictly adversary.

It is the purpose of this memorandum to acquaint the Court with the fact that there is at least one other party whose rights will be materially affected and whose application for formal intervention was stayed by these proceedings.

During the times hereinafter mentioned The National Refining Company (now named William Whitman Company, Inc.), an Ohio corporation, maintained refining plants at Findlay, Ohio, and at Coffeyville, Kansas, and was engaged in the business of producing, refining and selling petroleum products, chief among them gasoline. In the years 1930 and 1931 National installed and adopted in both plants the so-called and unpatented Winkler-Koch process for cracking petroleum and refining gasoline. The Winkler-Koch process was widely used by refining companies, including Root Refining Company, Defendant Appellant in this case.

Universal Oil Products Company is a patent holding company, its stockholders during the times hereinafter mentioned being several very large oil companies, among them Standard Oil Company of California, Atlantic Refining Company and Shell Union Oil Corporation. Substan-

tially its only business was the granting to or forcing of patent licenses upon lesser members of the industry and during the 1930's and early 1940's thereby received millions of dollars of royalties. Universal had filed a score or more infringement actions, many of them directed against users of the said Winkler-Koch process.

In order to meet the extensive resources of Universal which were available for its aggressive program, substantially all of the users of the Winkler-Koch process united to form a so-called Winkler-Koch Patent Company for defense purposes. That Company was authorized to provide defense counsel for its members and was financially supported by funds contributed by its members, determined by the volume of their products. The Winkler-Koch Patent Company selected and paid counsel who defended Root in the case of *Universal Oil Products Company vs. Root Refining Company*, which is the case now before this Court.

After dismissing without prejudice an earlier case against National, Universal instituted a suit in 1935 in the United States District Court in and for the Second Division, District of Kansas, being No. 960-N In Equity on the docket of said court, and entitled *Unversal Oil Products Company vs. National Refining Company.* In the complaint Universal alleged the infringement by National (by its use of the Winkler-Koch process) of several of Universal's patents, later by stipulation reduced to the so-called Egloff patent No. 1,537,593, and the Dubbs patent No. 1,392,629, and being the same patents in litigation in the said *Root* case. To said complaint National filed answer pleading invalidity of the patents and non-infringement thereof by it.

After the decision by the United States Court of Appeals for the Third Circuit in June 1935 in *Universal Oil Products Company vs. Root Refining Company*, 78 F. 2d 991 (opinion written by Judge Davis), affirming the decree of the District Court (6 F. Supp. 763), which had upheld the

validity of the said Dubbs and Egloff patents and the infringement thereof by Root's operations (the Winkler-Koch process), Universal, on March 13, 1937, filed in the Kansas case against National an Amendment to Bill of Complaint.

In said Amendment Universal set out the above suits against Root Refining Company charging infringement of the Egloff and Dubbs patents (Nos. 1,537,593 and 1,392,629 respectively); that in 1934 the United States District Court for the District of Delaware entered decree in favor of Universal and against Root Refining Company; that from said decrees Root perfected an appeal to the Circuit Court of Appeals for the Third Circuit which on June 26, 1935 affirmed the decrees of the United States District Court for the District of Delaware in all respects in an opinion reported in 78 F. 2d 991; that thereafter a petition for rehearing was filed and denied and that a petition for writ of certiorari was filed in the United States Supreme Court and by it denied on or about October 1, 1935; that on October 30, 1935 the mandates of the Circuit Court of Appeals for the Third Circuit to the District Court in conformity with its judgments aforesaid, were handed down.

In said Amendment it was further averred that prior to the trial of Universal's suits against Root there were meetings of oil refiners using or contemplating the use of apparatus and process for cracking of oil within the purview of one or both of the patents declared upon and that the defendant was present or represented at said meetings; that said refiners, including National, selected counsel to control and conduct such suit or suits as might be prosecuted under said patents against any of them for the infringement thereof and agreed to contribute money for the defense of such suit or suits in accordance with the plan agreed upon; that National did participate in the selection of counsel or did agree to or confirm the selection which was made and did contribute to a defense fund; that the counsel so selected did have full control of the defenses which were

made in the case of *Universal Oil Products Company vs. Root Refining Company* and that the fund so created was drawn upon to defray the expenses incurred in said defense, including counsel fees. Universal in said Amendment averred that for carrying out the purposes agreed upon at said meetings there was created an organization or voluntary association known as Winkler-Koch Patent Company, for collecting the contributions to be made as aforesaid and for dispensing them and for generally carrying out the purposes of the agreement of the refiners represented thereby in connection with the defense of any suit or suits which might be or which had been brought for patent infringement, including the patents in suit; that National agreed and consented to such procedure and had an interest in said organization, Winkler-Koch Patent Company and that the latter stood in the position of its agent; that said organization did itself and through attorneys of its selection and the selection of the companies which it represented, including National, conduct and control the defenses which were made in said *Universal Oil Products Company vs. Root Refining* suits aforesaid; that said organization is now and through the same attorneys controlling and conducting the defense which is being made in this case (the Kansas case against National).

Finally, in said Amendment Universal averred that the decree entered as aforesaid in said cases of *Universal Oil Products Company vs. Root Refining Company*, and all questions which were or might have been raised on behalf of National in said suits is or are now *res adjudicata*.

National was represented in said Kansas suit by counsel selected by the Winkler-Koch Patent Company, the same counsel which defended Root in the cases of *Universal Oil Products Company vs. Root Refining Company*. Said counsel filed on behalf of National an answer to said Amendment to Bill of Complaint in which National admitted that it held meetings with other oil refiners with the sole object of making arrangements for defraying the

cost and expenses of patent litigation arising out of the use by said oil refiners of the Winkler-Koch process; admitted that it contributed money to defray the expenses of the said litigation, including the defense of said case of *Universal Oil Products Company vs. Root Refining Company*; but National denied that the decrees entered in the cases of *Universal Oil Products Company vs. Root Refining Company* and all questions which were or might have been raised on behalf of National were *res adjudicata*.

Though its answer denied the legal effect of the averments of the Amendment to Bill of Complaint and its admissions thereto made, nevertheless National, upon the advice of counsel, was constrained to abandon further contest by reason of the *res adjudicata* plea and to capitulate and accept from Universal a license agreement. Within a month following the filing of said Amendment to Bill of Complaint there followed negotiations for a license agreement during the course of which Universal's officers repeatedly alluded to the judgments it had procured in the *Root* case. The negotiations resulted in National accepting a license agreement from Universal as of April 1, 1937, and since then National has paid or incurred liability for royalties in the amount of approximately one million dollars.

On June 15, 1944, the Third Circuit Court of Appeals ordered that its judgments entered in this case on June 26, 1935 be vacated and that the mandates which were issued on October 30, 1935 be recalled and the cases restored to the argument list for reargument. From that date National withheld the payment of royalties accruing under the said patent license agreement.

Following the decision of this Court on June 10, 1946, in *Universal Oil Products Company vs. Root Refining Company* (328 U. S. 575), National filed in the District Court of the United States for the District of Delaware, Civil No. 987 on the docket of said court, a complaint entitled

"*William Whitman Company, Inc. (formerly The National Refining Company), Plaintiff, vs. Universal Oil Products Company, Defendant.*" In said complaint National recited most of the facts hereinabove contained and also set forth the proceedings in the United States Circuit Court of Appeals for the Third Circuit which had been instituted upon the application of *amici curiae* in June 1941, and which resulted in the appointment of a Master with authority to investigate and make report to that Court his findings and conclusions concerning the relationship and dealings between Universal, Morgan S. Kaufman and J. Warren Davis, and in particular whether there was in connection with the prosecution and disposition of such causes such fraud, corruption, obstruction or distortion of justice as tainted and invalidated the judgments rendered by the said Circuit Court of Appeals in the *Root* case on June 26, 1935. Said complaint further recited the report of said Master and his findings that the judgment of the Court of Appeals for the Third Circuit in the *Root* case was tainted with fraud and corruption and was invalid; that the said Court of Appeals thereupon issued its order accepting the Master's report and vacating its judgment entered on June 26, 1935, and recalling its mandate issued October 30, 1935. National averred in said complaint that in the manner and by the means so found by the Master and accepted by the Third Circuit, the judgment of the United States Circuit Court of Appeals had been found to have been procured by the fraud of Universal; that Universal, in its subsequent conduct with respect to National, had concealed with fraudulent intent its action and the action of its agents and attorneys in the corruption of a member of said Court of Appeals which resulted ultimately in the subsequent vacation of the judgment. National prayed for a decree of the Delaware District Court cancelling and rescinding the license agreement entered into between the parties as of April 1, 1937 and for restitution. Said action

in the Delaware District Court is now pending upon the motion of Universal, defendant therein, to strike from the complaint all recitals relating to the action of the Third Circuit Court of Appeals upon the issue of corruption.

It has come to the knowledge of *amicus curiae* that there was in course of preparation a motion by National directed to the United States Circuit Court of Appeals for the Third Circuit for leave to intervene as a party of record in this case and that such motion was to have been filed on October 13, 1947 (which was the return day set by said court in its order of June 20, 1947, by which, among other things, it directed Universal to show cause why the judgments of that court entered on June 26, 1935 should not be set aside and vacated by reason of alleged fraud and corruption practiced upon the said court); that the filing of said motion was interrupted and suspended by the institution of the proceedings now before this Court.

DISCUSSION.

The very briefest summarization is all that will be appropriate under the present circumstances. The primary objective of *amicus curiae* has been to place before the Court by this memorandum the fact that there *is* a genuine controversy with adversary parties "in legal effect" and that it was only the institution of these proceedings which interrupted the intervention of such parties "of record."

The petitioner, Universal Oil Products Company, has suggested to this Court that "none of the other oil companies sued in other courts by petitioner for infringement of the same patents could have a further interest"; that "the cases in which pleas of *res adjudicata* had been set up by petitioner against the other oil companies had all been dismissed"; that "the patents involved no longer had any materiality to any one since the Dubbs patent had expired in 1938 and the Egloff patent had been held in-

valid by this Court." Universal represents to this Court that no one is interested in the future of this case since Universal itself cancelled out Root by "settling" with it—the very month following that in which the Third Circuit Court of Appeals vacated its judgments because of Universal's corruption in an agreement which provided, *inter alia*, that the decree of the Delaware District Court in this case be vacated, that the complaints filed therein be dismissed and that either party might cause an order to be entered or do any other necessary or advisable thing to effectuate the foregoing without further notice to the other.

But in making those representations to this Court, as well as in failing to "cancel out" others who, Universal itself avers, were parties to the controversy in legal effect, petitioner has made an error. *Amicus curiae* is informed that National is interested, that it intends to become a party of record as well as in legal effect and that it will supply the real controversy which petitioner complains has been missing. The history of the litigation recited in the foregoing statement shows this Court the procedure by which Universal *has* profited by its judgment obtained from the Third Circuit Court of Appeals and also shows the procedure by which it *hopes* to retain the profits. *If* it did obtain the judgment in the infamous manner which has been charged, it certainly reaped the benefit thereof by its subsequent conduct toward National. It charged that by reason of facts which National was forced to admit, National was *legally estopped* from further defenses against the Dubbs and Egloff patents because National was in legal effect *a real party* in the *Root* case and was bound by the judgment of the Third Circuit Court of Appeals therein. Whether or not National's counsel was right in surrendering to that charge (and that counsel was right was actually so held by the District Court for the Northern District of Illinois in a similar *res adjucata* plea in the case of *Universal Oil Products Company vs.*

Winkler-Koch Engineering Company, 27 F. Supp. 161 (1939)), Universal nevertheless achieved its objective to force payment of tribute to the patents. Even in the Delaware case now pending wherein National prays for rescission of the license agreement because the Third Circuit Court of Appeals vacated its 1935 judgment upon the ground of Universal's fraud, Universal has filed a motion to strike the allegations from the complaint and on the very ground that National was not a party to the proceedings in the *Root* case. It would appear that when it is to Universal's advantage to plead that National was a party, it does so; but when of greater advantage to plead that National was not a party, it does that. But the license to National was procured, and royalty paid thereunder, on Universal's charge that National *was* a party.

Amicus curiae suggests to this Court that the petitioner, having used its judgment to its great profit, now seeks to insulate itself from retribution by pleading that "there is no controversy." It is respectfully suggested that the interests of justice would be well preserved if this Court, whatever may be its decision, affords opportunity for parties "in legal effect" to become actual parties of record and thus complete such controversy as will afford the lower court unquestionable jurisdiction for its contemplated procedure.

Respectfully submitted,

LESLIE NICHOLS.

Copies of this Motion and Memorandum have been delivered to all counsel of record.

LESLIE NICHOLS.